No. 03-90

Supreme Court, U.S.
FILED
AUG 29 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

FRED URANGA,

Petitioner,

v.

FEDERATED PUBLICATIONS, INC.,
dba The Idaho Statesman,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Idaho

REPLY BRIEF

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I.

QUESTIONS PRESENTED

Whether the privilege of the press under the First and Fourteenth Amendments to the United States Constitution to publish matters of public record is absolute?

Whether the newsworthiness doctrine is applicable to the press's privilege to publish the public record, in situations of obvious, extreme violation of privacy, where no public interest in the particular disclosure exists, the disclosure is readily separable or redactable from the publication, and the press has knowledge (scienter) of the foregoing factors?

LIST OF PARTIES

Petitioner, Fred Uranga, was Plaintiff in the Fourth District Court of the State of Idaho, Appellant before the Idaho Court of Appeals, and Appellant before the Idaho Supreme Court.

Federated Publications, Inc., dba The Idaho Statesman, was the Defendant in the Idaho Fourth District Court, Appellee before the Idaho Court of Appeals, and Appellant before the Idaho Supreme Court.

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ARGUMENT

I.

THE FIRST AMENDMENT ISSUES PRESENTED BY THIS CASE ARE NOT "WELL-SETTLED" LAW.

Rather than responding to Uranga's analysis of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and Uranga's claimed extreme exception (based on the scienter of the publisher) to the general privilege to publish information from the public record, Respondent ("the Statesman") takes the position that it is well-settled law that the publication of public information cannot form the basis of a cause of action for violation of privacy rights. Although the Court in *Cox Broadcasting* recognized that " . . . the interests in privacy fade when the information involved already appears on the public record," (420 U.S. at 494-495) the Statesman pronounces that, rather than being diminished, it is settled law that such privacy rights have been extinguished. This is merely another way of stating that the press has an absolute privilege to publish information from the public record.

Further, the Statesman avers that "[a]dditional Supreme Court decisions have recognized that *Cox* sweeps broadly to protect the publication of the contents of public records. E.g. *Landmark Communications v. Virginia*, 435 U.S. 829, 840 (1978)" (Respondent's Brief in Opposition, Page 4). Contrary to the Statesman's "broad sweep" allegation, subsequent Supreme Court decisions have not been consistent in their characterization of the *Cox Broadcasting* holding. E.g. compare with *New York v. Ferber*, 458 U.S. 747, 759, Note 10 (1982) (stating that *Cox Broadcasting* and *Smith* "only stand for the proposition that if a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information . . . ").

As pointed out in Uranga's Petition, the Court in *Cox Broadcasting* emphasized that its opinion was narrow in

scope, limited to the issues raised by the particular facts before it, which involved the accurate publication of *true information* derived from judicial records open to the public. 420 U.S. at 491, 495, 496. This Court's more recent decisions in this arena, *Bartnicki v. Vopper,* 532 U.S. 514 (2001); *Florida Star v. B.J.F,* 491 U.S. 524 (1989); *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97 (1979); *Oklahoma Publishing Company v. Oklahoma County District Court,* 430 U.S. 308 (1977), also involved a publication of *truthful information* obtained from public sources and therefore do not directly resolve the issue raised by Uranga.

The Statesman simply claims that "*Cox* is not limited to the publication of incontrovertibly true information, and it cannot be distinguished on this ground." (Respondent's Brief in Opposition, Page 6). The Statesman presents no authority in support of this position. Instead, it plays upon the use of the word "truthful" in the *Cox Broadcasting* decision and ignores the distinction between "truthful" (accurate) publication and "truthful information." The Statesman repeatedly quotes the one passage of dicta in the *Cox Broadcasting* decision which would appear to support their position:

> "at the very least, the first and fourteenth amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." 420 U.S. at 496.

However, the scope of the application of this language is limited by the holding of *Cox* and construction of the word "information." Several lines later in the same paragraph of the *Cox* decision the Court states:

> "Once *true information* is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." Id. (emphasis supplied).

The Court in *Cox Broadcasting* clearly explained that the parameters of the fact situation in the case before it was limited to substratally true information, as follows:

> "The face-off is apparent, and the Appellants urge upon us the broad holding that the press may not be made criminally or civilly liable for publishing *information that is neither false nor misleading but absolutely accurate*, however damaging it may be to reputation or individual sensibilities." 420 U.S. at 419 (emphasis supplied).

As brought out in Uranga's Petition, even within this category of "true information" the Court abjured rendering the requested "broad holding", but strictly limited its decision in *Cox Broadcasting* to the narrow facts of the case. 420 U.S. at 491. Since the facts relevant to the privacy causes of action in Uranga do not involve "information that is neither false nor misleading but absolutely accurate", the expressed narrow holding of *Cox Broadcasting* and its progeny cannot be held to apply to the present case, if the repeated expressions regarding the limitation and narrow application of the case by the Court in *Cox Broadcasting* and its progeny are to be given their common meaning.

Uranga's case is brought on theories of violation of privacy by intrusion and by publication of private facts, neither of which theories require proof of the truth or falsity of the offending allegations. The Court in *Cox Broadcasting* specifically recognized that the Tort of invasion of privacy by disclosure of private facts does not require proof of the verity of said facts. In discussing the nature of that Tort, the Court stated:

> "Because the gravamen of the claimed injury is the publication of information, *whether true or not*, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the Constitutional freedoms of speech and press." 420 U.S. 489.

Within the context of that Tort, however, the Court in *Cox Broadcasting* expressly distinguished that case from Uranga's fact situation as follows:

> "... but we should recognize that we do not have at issue here an action for the invasion of privacy involving ... a publication of otherwise private information that is also false although perhaps not defamatory. The version of the privacy Tort now before us ... is that in which the Plaintiff claims the right to be free from unwanted publicity about his private affairs, which, *although wholly true*, would be offensive to a person of ordinary sensibilities." Id. (emphasis supplied).

With regard to the issue of "truthfulness", the offending allegations in Uranga must be categorized as either "nontruthful" (as distinguished from untruthful) or as allegations about which the truth is unknown. Based on the foregoing, neither the facts nor the holding in the *Cox Broadcasting* case can be made applicable to this case.

Finally, a further distinction of the Uranga case can be made in that *Cox Broadcasting* is the only common law public disclosure tort case which this Court has considered to date in the arena of right of privacy versus freedom of the press. All post *Cox Broadcasting* cases considered by this Court have been brought by Plaintiff's on other causes of action, and in each case, the Court limited the holding to the narrow facts of the case. For example, in *Florida Star*, a criminal statute was found unconstitutional as well as the application of a *per se* theory of negligence derived from the criminal statute, because of the categorical prohibition placed on the publisher. 491 U.S. 539-40.

The Statesman's attempt to sweep Uranga into an allegedly broad, well settled rule that the press is automatically shielded from liability for publishing any document found in the public records is nothing more than an effort to create absolute immunity for the press by another route, contrary to the continued refusal of this Court, without exception, to make any such sweeping rulings. (Petition, Pages 10-12).

II.

THE CURRENT AND EVOLVING FACT AND POLICY SITUATIONS UNDERLYING THE CLASH BETWEEN INDIVIDUAL PRIVACY RIGHTS AND FREEDOM TO PUBLISH PUBLIC INFORMATION WARRANTS THIS COURT'S CONSIDERATION OF THESE IMPORTANT CONSTITUTIONAL QUESTIONS.

Almost thirty years have elapsed since this Court announced its decision in *Cox Broadcasting*. In its decision, the Court expressly left open the question "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendment. . . ." (420 U.S. at 491). Petitioner submits that since the decision in *Cox Broadcasting*, society has witnessed significant changes in the general fact situations regarding individual privacy and the press that underlie the premises upon which that decision was based and which underlie the questions raised by this Petition. The combination of the changes in the underlying general fact situations and the extreme nature of the privacy violation and the scienter of the Statesman in this case merit the Court's review of the questions posed by this Petition.[1] The Court can take judicial notice that in the

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[1] See Karl N. Llewellyn, *The Common Law Tradition, Deciding Appeals*, Part I, at 121-122 (Little, Brown and Co., 1960). Here the author discusses appellate courts' techniques for reasoned handling of case specific facts, precedent, and the underlying general fact situations in order to arrive at a decision which speaks "with a single, persuasive tongue:"

> "What clue have we then? The answer is found first in that other major duty of the court, unimplemented by much doctrinal or other verbal machinery, but there, live, throbbing like a heart: the felt duty to justice which twins with the duty to the law.
>
> The justice-duty works, as has been noted, through the facts. The thrust of fireside equities may be deplored, but

(Continued on following page)

interim significant general changes have occurred in society, whereby individual privacy has been significantly diminished in the face of the accelerating use and application of electronic or digital information, including, its gathering, retrieval, processing, transmogrification, access

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who doubts that an appellate court can be open to it? "Hard cases make bad law" reminds us that the thrust may be enough to twist an otherwise good rule out of shape. The evidence for this draws on more than "common knowledge" (which can so often be unmasked as common superstition); it draws on that most uncommon knowledge which I call horse sense, the balanced shrewdness of the expert in the art.

* * *

Much less frequently phrased is the differential impact of the facts of the individual case and the facts of the situation taken as a type, the distinction on which I have already insisted, and which I shall have to stress throughout. I do not suggest of course that because the two are distinct in nature and in use they need to be separate in life or to be kept separate in argument: one of Davis' greatnesses as an advocate lay in his ability to combine the two and make the particular lend its poignancy and appeal to the more general situation which was in turn to shape the rule. But for purposes of analysis and for purposes of the best appellate judging we need to keep the type-situation-facts clear as a peculiar kind of facts with a peculiar message, nay, mission. I doubt if the matter has ever been better put than by that amazing legal historian and commercial lawyer, Levin Goldschmidt: "Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus not eternal nor changeless nor everywhere the same, but is indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law."

and distribution.[2] Similar notice can be taken regarding the evolution of the structure of the ownership and control of the media, whereby the right of freedom of the press has increasingly become used, controlled, and defined by large corporate entities. The diminishment of the individual's right of privacy has approached near extinction when confronted by these changes in combination.

Further, general knowledge of the use and abuse of electronic information teaches us that today's reality is that *anything* can be gotten into the public record, no matter how scurrilous or outrageous.[3] With regard to protection and control of the public record, the Court in *Cox Broadcasting* stated "If there are privacy interests to be protected in judicial proceedings, the states must respond by means which avoid public documentation or other exposure of private information." (420 U.S. at 496).

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[2] This Court has frequently taken judicial notice of the underlying general fact situations in reaching decisions involving First Amendment issues. See, for example, *Meyer v. Grant*, 486 U.S. 414 (1988); *Hamling v. United States*, 418 U.S. 87 (1974); *Heller v. New York*, 413 U.S. 483 (1973). Judicial notice has even been extended by the Court to the psychological cognizance of the general public. See, for example, *Norfolk & Western Railway Company v. Liepelt*, 444 U.S. 490 (1980), wherein the Court quoted with approval:

> " . . . and Judge Aldisert, writing for the 3rd circuit agreed: 'we take judicial notice of the "tax consciousness" of the American public. Yet we also recognize . . . that few members of the general public are aware of the special statutory exception for personal injury awards contained in the internal revenue code.'" 444 U.S. at 497.

[3] Judicial notice also has been taken by the Court of the state of advancement and capability in technical areas. See, for example, *Heller v. New York*, 413 U.S. 483 (1973), an obscenity case involving both First, Fourth and Fourteenth Amendment issues, the Court took judicial notice of the fungible nature of films and their susceptibility to alteration: "We take judicial notice that such films may be compact, readily transported for exhibition in other jurisdictions, easily destructible, and particularly susceptible to alteration by cutting and splicing critical parts of film." 413 U.S. at 483.

Although silent on this issue in its final opinion herein, the Idaho Supreme Court in its first opinion in this case commented on the practical impossibility of Court systems to control the input of information into official court records:

> The Court in *Cox Broadcasting* also reasoned that "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded the public interest was thereby served." 420 U.S. at 495. States may have some limited control over what information is placed in an official court record, and who has access to that information, but no such control can be reasonably maintained over every piece of information that makes its way into a court file. We cannot presume that the deputy court clerks have the means of scrutinizing and controlling information they are asked to file, and by filing information, have concluded it is in the public interest to forever shield the press from liability for publishing that information. App. 27.

Many Courts are now installing software systems for electronic filing and the use of electronic documents in discovery and in court proceedings. Judicial notice can be taken that the possibility of insertion into court records of irrelevant, false, embarrassing, or scurrilous information regarding an individual's most private life, whether inadvertently or intentionally, has geometrically increased since 1975. There can be no doubt that today, by the use of "viruses", "worms" and other devises, one intent on inserting private information regarding an individual into the public record, thereby placing that individual in jeopardy of being "exposed" through the media, can succeed in so doing. In reality today, particularly in cases of intentional or reckless exposure or publication, there is little distinction remaining between private information generally and that contained in the public record. For that reason, Petitioner respectfully suggests, a standard should be applied requiring the press to exercise its professional judgment in undertaking a newsworthiness analysis when

placed on notice in extreme cases of invasion of individual privacy.

Accordingly, Petitioner submits that publication of information in extreme cases of invasion of privacy should not be privileged on the sole ground that the information is contained in the public record. "Extreme cases" must be limited to those situations where the invasion into individual privacy is so extreme that knowledge or "scienter" of the invasion constitutes notice.[4] In other words, an editor applying his "horse sense", as Llewellyn would call it (footnote 1, supra), would be aware of the invasion upon seeing the information and thereby placed on notice to consider the circumstances further. Once so placed on notice, the publisher would analyze whether there is a public interest to be served by the disclosure and whether the information can be reasonably redacted or separated from the other information that is to be published. (This process presents nothing new, it is routinely done in other circumstances.)

The exclusion from the privilege would be based on the scienter of the publisher combined with an extreme violation of privacy, a lack of public interest in the disclosure of the information, and the ready redactability of the disclosure from the publication generally. There would be

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[4] The effect of such notice provided by scienter is analogous to the recognition that proof of scienter in obscenity cases avoids the hazards of self-censorship of constitutionally protected material and compensates for any vagueness in the definition of obscenity – or in the present case, in the degree of extremeness of the invasion of privacy. In *Roth v. United States*, 354 U.S. 476 (1957), the Court held in an obscenity case with regard to the effect of scienter, as follows:

> The constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity. The New York definition of the scienter required by (the New York Statute) amply serves those ends, and therefore fully meets the demands of the constitution. 354 U.S. at 495-496 (Warren, C.J., concurring). 383 U.S. at 511.

no exception to the general privilege for unobserved invasions of privacy. However, a newsworthiness analysis would be applied in cases, such as the present case, where the privacy invasion was admittedly known and in those cases of undeniable scienter on the part of the publisher due to the obvious, extreme nature of the invasion of privacy. Such scienter substantially diminishes any "chilling effect" on the exercise by the press of its First Amendment rights, since it serves as notice of a possible problem and leaves all other exercises of the privilege unaffected. Such a standard would serve to protect individual privacy from obviously extreme invasion in circumstances where there is little or no public interest in disclosure.

CONCLUSION

Petitioner Uranga submits that the exception to the privilege to publish information from the public record proposed above would serve to make more precise the press's use of the First Amendment freedom and enhance the fairness of its application in clashes with individual privacy rights. The requirement of the presence of scienter would avoid self censorship and any "chilling effect" in the exercise of freedom of the press. Finally, such an exception would serve to prevent the practical extinction of individual privacy and to form an outer boundary to protect privacy interests in extreme cases of violation of privacy rights where the press has scienter. This Court is respectfully requested to grant Uranga's Petition for Writ of Certiorari.

Respectfully submitted,

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